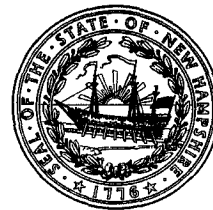




The State of New Hampshire
Department of Environmental Services



Michael P. Nolin
Commissioner

November 16 2005

Peter Nugent
PO Box 77
Colebrook, NH 03576

**NOTICE OF DECISION
ADMINISTRATIVE FINE
DOCKET NO. AF 04-096**

Dear Mr. Nugent:

By Notice of Proposed Administrative Fine No. AF 02-031 issued December 30, 2004, the New Hampshire Department of Environmental Services Waste Management Division ("Division") sought administrative fines totaling \$6,400 against you for alleged violations of RSA 146-A, specifically for failing to comply with the requirements for the registration, design, installation, operation, maintenance, and monitoring of above-ground petroleum storage facilities at Department of Environmental Services ("DES") site number 200310043, located at the Nugent Bulk Plant, Colby Street, Colebrook, NH ("the Property").

Pursuant to RSA 146-A:15, and based on my review of the evidence presented at a hearing held on this matter on October 3, 2005, I have concluded that a fine of \$7,680 is justified as set forth below:

This decision is based on the following findings of fact and conclusions of law:

FINDINGS OF FACT.

1. Peter Nugent ("Mr. Nugent" or "respondent") is an individual having a mailing address of P.O. Box 77, Colebrook, New Hampshire 03576.
2. Mr. Nugent is the registered facility owner of two 20,000-gallon vertical aboveground storage tanks ("ASTs"), five 15,000-gallon vertical ASTs, one 15,000-gallon horizontal AST, and one 10,000-gallon horizontal AST that contains gasoline, kerosene, diesel fuel and No. 2 heating oil and are located at the Nugent Bulk Plant, Colby Street, Colebrook, NH ("the Property"), and further identified by the DES site number 200310043 and the AST identification number 0000190 ("the Facility").
3. In a letter dated March 21, 2003, the Division notified Mr. Nugent of the requirement to register the ASTs at the Facility with the Division. (DES Exhibit #1)

4. In a telephone conversation between DES employee Michael Juranty and Mr. Nugent on January 15, 2004, Mr. Juranty once again notified Mr. Nugent of the requirement to register the ASTs at the Facility with the Division and comply with the rules applicable to ASTs in New Hampshire. (DES Exhibit #2)
5. In a letter dated January 15, 2004, the Division again notified Mr. Nugent of the requirement to register the ASTs at the Facility with the Division. (DES Exhibit #3)
6. On April 28, 2004, a Division inspector conducted a compliance inspection at the Facility. Compliance deficiencies were identified in a Division letter dated May 7, 2004, issued to Mr. Nugent, and notifying him that compliance was to be achieved within 45-days of the date of the letter in order to avoid enforcement action per RSA 146-A:15 and Env-C 600 for those deficiencies. The letter also enclosed the required registration form and the relevant DES Fact Sheet describing the regulatory requirements. (DES Exhibit #4)
7. In a letter dated June 23, 2004, the Division once again notified Mr. Nugent of the deficiencies identified during the April 28, 2004 inspection, and notified him that enforcement action in the form of proposed fines would be initiated if the deficiencies were not corrected within 30-days. (DES Exhibit #5)
8. By letter dated August 5, 2004, the Division received the completed registration form for the 9 ASTs from Engel Environmental Services, Inc., on behalf of Mr. Nugent. The consultant's letter acknowledged the deficiencies and asserted that the ASTs remained in use and contained substantial product. (DES Exhibit #6)
9. In a letter dated August 11, 2005, the Division acknowledged receipt of the registration form and again notified Mr. Nugent of the rules and statutes associated with the operation and ownership of ASTs. (DES Exhibit #7)
10. On December 30, 2004, DES issued a Notice of Proposed Administrative Fine No. AF 04-096 ("the Notice") to Mr. Nugent, seeking fines totaling \$6,400 for violations of statutes and rules governing aboveground petroleum storage tank facilities. Pursuant to the U.S. Postal Service return receipt card on file with DES, Mr. Nugent received the Notice on January 4, 2005.
11. DES notified Mr. Nugent in a letter dated August 15, 2005 that a hearing in this matter had been scheduled, for October 3, 2005, at 2:30 P.M., in Room 110 at 29 Hazen Drive, in Concord, New Hampshire. Mr. Nugent received the hearing notice, as evidenced by a U.S. Postal Service return receipt card signed by "Marc Nugent" that is in the hearing file. The letter notified Mr. Nugent of the requirements for submission of exhibit and witness lists, the procedures for requesting that the hearing be rescheduled and that the hearing would be conducted in his absence in accordance with Env-C 204.09.

12. A hearing in this matter was held on October 3, 2005, at 2:30 P.M., in Room 110 at 29 Hazen Drive, in Concord, New Hampshire. Mr. Nugent did not attend the hearing. The hearing was conducted in his absence in accordance with Env-C 204.09.
13. DES employees Michael Juranty and Lynn Woodard testified about the Division's communications with Mr. Nugent concerning the violations and offered documentary exhibits 1 through 10 into evidence.
14. Mr. Nugent violated Env-Wm 1402.5 by failing to register the nine AST systems at the Facility. For this violation, Env-C 615.02(a) specifies a fine of \$1,500 per requirement that is not met per system. While each AST constitutes a separate violation, the Division sought a fine for only one violation.
15. Mr. Nugent violated Env-Wm 1402.12 by failing to properly take the two horizontal AST systems out of service. For this violation, Env-C 615.04(c) specifies a fine of \$400 per requirement that is not met per system. While each AST constitutes a separate violation, the Division sought a fine for only one violation.
16. Mr. Nugent violated Env-Wm 1402.29 by failing to perform detailed interior tank inspections on the seven vertical AST systems by April 25, 2002. For this violation, Env-C 615.04(l) specifies a fine of \$500 per requirement that is not met. While each AST constitutes a separate violation, the Division sought a fine for only one violation.
17. Mr. Nugent violated Env-Wm 1402.30 by failing to prepare and implement a SPCC Plan prepared in accordance with 40 CFR Part 112. For this violation, Env-C 615.05(b) specifies a fine of \$2,000 per 3-calendar-month period or portion thereof that the plan is not prepared or implemented, as applicable, after the deadline specified in writing by the Division. While each AST constitutes a separate violation, the Division sought a fine for only one violation.
18. Mr. Nugent violated the overfill prevention requirements of Env-Wm 1402.35(a) by failing to install a gauge or other measuring device on two of the vertical AST systems, and for failing to have a high level warning alarm that is both audible and visible to the person controlling the transfer of oil on any of the vertical AST systems. For these nine violations, Env-C 615.03(j) specifies a fine of \$1,500 per standard that is not met per device required. While each AST constitutes a separate violation, the Division sought a fine for only one violation.
19. Mr. Nugent violated Env-Wm 1402.35(c) by failing to mark the vertical AST systems with the safe fill height of the tank, the product stored, and the NFPA symbol for a total of seven marking violations. For this violation, Env-C 615.03(c) specifies a fine of \$500 for each standard that is not met per tank. While each AST constitutes a separate violation, the Division sought a fine for only one violation.

20. The Division requested that the penalty amount of \$6,400 identified in the Notice be increased by a factor of 60% based on the additional circumstances listed in Env-C 601.09(d).

Conclusions of Law

1. RSA 146-A authorizes the Department of Environmental Services (“DES”) to minimize contamination of the waters and land of the state due to improper storage and handling of petroleum by establishing requirements for the operation of aboveground petroleum storage facilities (“AST”). Pursuant to RSA 146-A:11-c, the Commissioner of DES has adopted NH Admin. Rules Env-Wm 1402 to establish requirements for the registration, design, installation, operation, maintenance, and monitoring of above-ground petroleum storage facilities.
2. RSA 146-A:15 authorizes the Commissioner of DES to impose administrative fines of up to \$2,000 per offense upon any person who violates any provision of RSA 146-A or any rule adopted under the provisions of this chapter. Pursuant to RSA 146-A:15, the Commissioner has adopted Env-C 615 to establish the schedule of fines for such violations.
3. The AST systems at the Facility are subject to the requirements of RSA 146-A and Env-Wm 1402.
4. Env-Wm 1402.05 requires the owner of any AST facility to register all AST systems at the facility with the DES.
5. Env-Wm 1402.12 requires the owner of any AST system taken out of service to comply with the out of service requirements of Env-Wm 1402.12.
6. Env-Wm 1402.29 requires the owner of all AST systems having a capacity greater than 5,100-gallons to thoroughly drain and clean the interior of the tank and have a detailed interior tank inspection performed by a qualified professional engineer (“P.E.”) or API 653 certified tank inspector by the time the tank is 10-years old or by April 25, 2002, whichever is later.
7. Env-Wm 1402.30 requires that all AST facilities shall have a written Spill Prevention, Control, and Countermeasures Plan (“SPCC Plan”) prepared in accordance with Title 40 of the Code of Federal Regulations, Part 112, be current, accurately reflect all AST systems at the facility, and be certified by a P.E.
8. Env-Wm 1402.35(a) required that all AST systems installed prior to April 25, 1997, have overfill protection consisting of a product level gauge in accordance with Env-Wm 1402.24(a) and a high level alarm in accordance with Env-Wm 1402.24(b) by April 25, 2000.

9. Env-Wm 1402.35(c) requires that all AST systems installed prior to April 25, 1997, have tank markings as described in Env-Wm 1402.18(e) by April 25, 2000.
10. Based on the testimony of Mr. Juranty, Mr. Woodard and Exhibits 1 through 10, the Division proved by a preponderance of the evidence that Mr. Nugent committed the violations alleged in the Notice.
11. The base amount of the fine sought by the Division, \$6,400, is warranted by the facts and law of this case.
12. Env-C 601.09 (d) provides that the amount of a fine shall be increased by 10% based on specific aggravating factors, such as knowledge of the regulatory requirements at issue, environmental threat or harm, direct or indirect economic benefit derived from the violation, failure to act in good faith and history of non-compliance with environmental regulations.
13. The Division proved by a preponderance of the evidence that Mr. Nugent was aware of the requirements applicable to the operation and maintenance of aboveground storage tank systems during the period in time in which the violations alleged in the Notice occurred.
14. The Division failed to prove by a preponderance of the evidence that any environmental threat or harm caused by the violations alleged in the Notice had not been alleviated as of the date of the hearing.
15. The Division failed to prove by a preponderance of the evidence that Mr. Nugent derived some direct or indirect economic benefit from failing to properly maintain and operate the AST systems which are the subject of the Notice.
16. The Division failed to prove by a preponderance of the evidence that Mr. Nugent did not act in good faith to remedy the violations for which the fines are sought.
17. The Division failed to prove by a preponderance of the evidence that Mr. Nugent has a history of non-compliance with any other DES statutes, rules, or permits.
18. The Division proved by a preponderance of the evidence that other factors exist which cause the violations to be more serious in this case, to wit: important water resources are threatened by Mr. Nugent's failure to properly maintain and operate his AST systems on the Property. The environmental harm meant to be avoided by following the rules Mr. Nugent violated threatened a large number of people and significant property interests.
19. Pursuant to Env-C 601.09 (d), the amount of the fines imposed for the specific violations found above shall be increased by 20% based on the conclusions reached in Paragraphs 12 through 18.
20. A total fine in the amount of \$7,680 is warranted by the facts and law of this case.

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The total assessed fine of \$7,680 shall be paid within 30 days of the date of this decision. Fine payments shall be by certified check or money order payable to "Treasurer-State of NH" and sent to the attention of the Legal Unit, DES/Office of the Commissioner, PO Box 95, Concord, NH 03302-0095.

Any party aggrieved by this decision may file a motion for reconsideration within 30 days of the date of this decision, in accordance with NH RSA 541 and Env-C 206 (copy enclosed).

COMMISSIONER OF ENVIRONMENT SERVICES

By: 
Michael J. Walls, Presiding Officer

cc: Michael P. Nolin, Commissioner
Harry T. Stewart, P.E., Director, Water Division
Gretchen R. Hamel, Administrator, DES Legal Unit
Kerry D. Barnsley, DES Legal Unit
Lynn Woodard, DES WMD
Public Information Officer, DES PIP

PART Env-C 206 MOTIONS FOR RECONSIDERATION

Env-C 206.01 Purpose. The rules in this part are intended to supplement any statutory provisions, such as RSA 541, which require or allow a person to request reconsideration of a decision of the department prior to appealing the decision. These rules do not create the right to request reconsideration of a decision where it does not otherwise exist under law.

Source. #6960, eff 3-25-99

Env-C 206.02 Applicability. The rules in this part shall apply whenever any person has a right under applicable law to request a reconsideration of a decision prior to filing an appeal of the decision with the applicable court or council having appellate jurisdiction.

Source. #6960, eff 3-25-99

Env-C 206.03 Time for Filing. As specified in RSA 541:3, any motion for reconsideration shall be filed no later than 30 days after the date the decision that is the subject of the motion was issued.

Source. #6960, eff 3-25-99

Env-C 206.04 Filing.

(a) Any person wishing to request reconsideration of a decision of the commissioner shall file the original and 2 copies of a motion for reconsideration at the following address:

Office of the Commissioner, Enforcement Unit

Department of Environmental Services

6 Hazen Drive

Concord, NH 03301

(b) Any person wishing to request reconsideration of a decision of a division relating to a matter for which the commissioner has delegated the decision-making authority to the division shall file the original and 2 copies of a motion for reconsideration with the director of the division at the following address:

Department of Environmental Services

29 Hazen Drive

Concord, NH 03301

(c) For purposes of this section, a "decision of the commissioner" means a decision that is signed by the commissioner, or by the assistant commissioner on behalf of the commissioner, either alone or in conjunction with a division director, such as an administrative order.

(d) For purposes of this section, a "decision of a division" means a decision that is signed by a division director or other authorized division staff, but not signed by the commissioner or by the assistant commissioner on behalf of the commissioner, such as a decision to issue or deny a permit.

Source. #6960, eff 3-25-99

Env-C 206.05 Format and Content of Motion. The person filing a motion for reconsideration shall provide the following information:

- (a) The exact legal name of each person moving for reconsideration and the residence address or principal place of business of the person;
- (b) A clear and concise statement of the reason(s) why the person believes the decision to be in error;
- (c) A concise and explicit statement of the facts upon which the department is expected to rely in granting relief;
- (d) A clear and concise statement of the specific relief or ruling requested;
- (e) A copy of the decision which is the subject of the motion; and
- (f) Such other information as the party filing the motion deems pertinent and relevant, including sworn written testimony and other evidence that was not available for the hearing.

Source. #6960, eff 3-25-99